IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO.167 OF 2006
IN
NOTICE OF MOTION NO.3950 OF 2005
IN
SUIT NO.3376 OF 2005

B. Jeejeebhoy Vakharia & Associates — Appellant
vs.
Sahara India Commercial
Corporation Limited & ors. — Respondents

Mr.Janak Dwarkadas, Senior Advocate with Mr.Pravin Samdani, Senior Advocate i/b.M/s.HIralal Thakkar & Co. for the appellant.

Mr.Nitin Thakkar, Senior Advocate with Mr.Navnit Shah & Ms.Pallavi Sharma, Ms. Kamini Varma, advocates i/b.M/s.Markand Gandhi & Co. for the respondent no.1.

Ms.Rajani Iyer with Mr.Kishore Jain i/b.Mr.Tushar Garodiya for the respondents 7 and 11.

CORAM : R. M. LODHA &
J. P. DEVADHAR,JJ.

DATED : 10th April, 2006

P.C.

We heard Mr.Janak Dwarkadas, the learned senior counsel for the appellant and Mr.N.G.Thakkar, the learned senior counsel for the respondent no.1.

2. The appeal is at the instance of the original defendant no.1 being aggrieved by the ad-interim order dated 2nd February, 2006 passed by the learned motion Judge whereby the defendant no.1 (appellant herein) has been restrained from alienating, encumbering or creating third party rights or parting with possession of the suit property until disposal of motion.

3. As the appeal is directed against the ad-interim order and the notice of motion is pending, we intend to dispose of the appeal at this stage without dealing with the matter elaborately. The contesting parties are the appellant and respondent no.1 and they are represented.

4. The principal prayer made by the original plaintiff (respondent no.1) in the Suit filed by them is for specific performance of the Memorandum of Understanding dated 22nd December, 2001 and the draft agreement, supplementary draft agreement and three approved draft declarations.

5. We minutely perused the Memorandum of Understanding dated 22nd December, 2001 for the purposes of ad-interim relief. On prima facie consideration, we find that the Memorandum of Understanding even if be assumed to be final agreement (though there is serious doubt about it) is nothing but the development agreement for the development of the land admeasuring approximately 500 acres on CTS No.1 (Survey No.161 (part) of village-Pahadi-Goregaon, taluka: Borivali at Mumbai. In the long line of orders having been passed by this Court from time to time, it has been consistently held that the development agreement is not capable of specific enforcement. The reason is simple: for breach of an agreement like this, damages is the adequate remedy.

6. That there were draft agreements exchanged between the parties subsequent to the execution of Memorandum of Understanding and that final agreement was not executed by the defendant no.1 is clear from the prayer made in the suit itself whereby the plaintiff has sought specific performance of the draft agreement, supplemental draft agreement and approved draft declaration. The plaintiff has set up the case in the plaint that the defendant no.1 is liable to enter into and execute the agreement which has been approved and upon which a stamp duty of Rs.1,66,49,410/- has been paid by the plaintiff on 5th April, 2005. This also prima facie shows that no final and concluded contract concerning the property has yet come into existence.

7. In our considered view, therefore, the learned motion Judge seriously erred in granting ad-interim to the plaintiff. The facts of the case and the nature of documents upon which the case of the plaintiff is founded do not justify exercise of discretion in plaintiff's favour for grant of ad-interim order.

8. The learned senior counsel for the appellant (defendant no.1) submitted that the defendant no.1 is ready and willing to refund the amount of Rs.25 crores to the plaintiff. We asked the learned senior counsel for the plaintiff (respondent no.1) whether the plaintiff is prepared to take back the sum of Rs.25 crores without prejudice to their rights and contentions

in the Suit and the notice of motion, the learned senior counsel submitted that the plaintiff is not willing to take back the said amount and the court may pass appropriate order.

9. The result is that we set aside the order dated 2nd February, 2006 passed by the learned motion Judge. The appellant (defendant no.1) shall deposit a sum of Rs.25 crores with the Prothonotary and Senior Master of this Court immediately and in no case later than one week from today. Needless to clarify but we do that the learned motion Judge shall hear and decide the notice of motion independent of the observations made by us in this order. The very brief reasons indicated by us are only to show that the learned motion Judge was not justified in granting ad-interim order.

10. Appeal stands disposed of in terms aforestated.

11. The learned senior counsel for the plaintiff orally prays for stay of the operation of this order. For the reasons that we have indicated above, we find no justification in staying the order. Oral prayer for stay is rejected.

(R.M.LODHA,J.)

(J.P. DEVADHAR,J.)